IN THE

Supreme Court of the United States

No. 674, October Term, 1928

Harry J. Kirk, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, et al.,

Appellants,

vs.

The Maumee Valley Electric Company,

Appellee.

No. 675, October Term, 1928

Harry J. Kirk, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, et al.,

Appellants,

vs.

The Providence Mill Company,

Appellee.

On Appeal from the District Court of the United States, Southern District of Ohio, Eastern Division

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BRIEF ON BEHALF OF APPELLEES IN ANSWER TO APPELLANTS' MEMORANDUM AND REPLY BRIEF

U. G. DENMAN, Toledo, Ohio,
KARL E. BURR, Columbus, Ohio,
Counsel for Appellees.

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BRIEF ON BEHALF OF APPELLEES IN ANSWER TO APPELLANTS' MEMORANDUM AND REPLY BRIEF

I

CASE NUMBER 674, OCTOBER TERM, 1928

A. Correction of Typographical Error in Our Principal Brief:

The words "Lineal Part 1" in the last paragraph on page 171 of our principal brief in the third line from the bottom of the page should be "Lineal Part 2."

B. The Syllabus Paragraphs of the Cases on Which Appellants Rely Apply Only to the Facts in Those Cases Respectively and Do Not Control the Instant Case, the Facts and Circumstances of Which Are Widely and Essentially Different From and in Sharp Contrast With the Facts in Any of Those Cases:

Notwithstanding the syllabus of a decision of the Supreme Court of Ohio declares the law of the state, it does so "with reference to the facts upon which it is predicated and must be read in view of the facts found in the case." (*B. & O. R. R. Co. vs. Badlic*, 112 O. S. 567.) It is therefore again submitted on behalf of appellee that the third clause of the syllabus in the *Middletown* case (114 O. S. 437), *when read in connection with the facts in that case*, wholly sustains the contention of appellee that the state, having abandoned the canal for navigation purposes, now maintains it in its private capacity, as the proprietor of a great hydraulic power, and that its contracts in respect of that power are to be measured by the rules applicable to private individuals. In that case the third defense of the Hydraulic Company's answer averred that the state, in the construction of the Miami and Erie Canal, was authorized to appropriate, and in fact did appropriate, only such waters from the Miami River as were necessary for the purposes of navigation in and along the canal; that, navigation on the canal having long since ceased, the state was not entitled to take water from the river for the purpose of providing hydraulic power to manufacturers and others, and that the state was without power under

any act of the legislature to own, operate or maintain a canal solely for the purpose of leasing water to others for power purposes. (Opinion of Robinson, J., 114 O. S., pp. 441. 442.)

On this subject the court said at page 457:

> "The third defense, that the state, having abandoned the purpose for which it acquired its Miami and Erie Canal water rights, is now without authority of law exercising those water rights for a wholly different purpose, is met by the two principles heretofore discussed:
>
> (1) That in its proprietary capacity, its property rights are the same as those of private proprietors.
>
> (2) That the specific purpose for which it acquired water rights does not limit it to the use of those rights for that purpose, unless it is expressly prohibited from using them for any other purpose, but the specific purpose for which they were acquired operates as a limitation of quantity and not of character of use."

Consistently with the foregoing the third clause of the syllabus is as follows:

> "3. Where water rights are granted for a specified use, or are excepted from a grant for a a specified use, in the absence of an expressed intention that that grant or the limitation are for no other use, the specification of the use will not be regarded as a limitation of the character of the use, but only as a limitation of the quantity of the use."

Read in connection with *the facts in the case* the foregoing clause of the syllabus seemingly settles at least one point beyond the possibility of contradiction, *viz.*, that navigation on the canal having long since

ceased, the status of the state in respect of its canal waters now under lease is that of a *proprietor*. There would seem to be no escape from that proposition. And if that be so, *i. e.*, if the status of the state is now that of a proprietor of a water power, then (a) the obligations of the state in respect of its proprietary water power contracts are as enforcible as those of an individual, and (b) appellants cannot prevail by taking refuge behind the alleged sovereign character in which the state constructed the canal in the first instance.

Nor will the rule of *stare decisis* apply where, as is now true, the conditions surrounding the *Hubbard* case and similar cases have so changed that hydraulic power has been substituted for navigation as the now paramount purpose of the canal. In *Faris vs. State*, 3 O. S. 159, 167, the rule is stated as follows:

> "While the rule of *stare decisis* is the great safety of rights subject to judicial decision, maxims and regulations fitted to a former state of society and government are not to be preserved and forced into an unnatural application, when and where the very conditions necessary to them when established, have long since passed away."

It is significant, also, that notwithstanding there had been no legislative abandonment of the portion of the canal involved in the *Middletown* case, the court nevertheless considered and treated the canal as having been abandoned for navigation by *non-user*. It seems rather anomalous to require legislative action as a condition of abandonment for navigation purposes when such abandonment in point of fact has existed for some thirty years last past. Naturally the superintendent of public works still holds office, because his office is created by

the State Constitution; naturally, also, there are duties of his office in respect of the remaining canals maintained for hydraulic purposes, *e. g.*, the collection of rentals, maintenance and upkeep of some sections, etc., etc. To declare, however, that in the face of the admitted facts in this case, that there has been no abandonment for navigation purposes and that there will be none until the legislature solemnly declares in favor of such abandonment is the equivalent of saying that it requires an act of the legislature to establish in point of law something already established in point of fact for more than a generation—which does not seem sound.

And, of course, there had been no legislative abandonment of the portion of the canal involved in the *Middletown* case up to the time of the decision in 114 O. S. 437. True, an effort has since been made to abandon it for both canal and hydraulic purposes (Act of April 21, 1927, 112 O. L., p. 388; brief on behalf of appellee, pp. 94, 95 and 236), but it is significant that notwithstanding the attempted abandonment no action has been brought to oust the Middletown Hydraulic Company from its use of the water power again assured to it by the decision in the second *Middletown* case (116 O. S. 26) wherein, on the merits, the court determined that "the defendant *has title as against the state* to the use of 19,463.50 cubic feet of water per minute in excess of 8,000 cubic feet per minute, to which the state has title * * *."

The first *Middletown* case, 114 O. S. 437, was decided March 23, 1926, and the second *Middletown* case, 116 O. S. 26, was decided February 15, 1927. Both of these cases therefore were decided, as indicated above, prior to the passage of any legislative act by the legis-

lature of Ohio abandoning the portion of the Miami and Erie Canal on which the water power in question in those two cases is located. The only abandonment act ever passed by that legislature is the act cited just above, passed April 21, 1927, 112 O. L. 388. As urged in our principal brief, therefore, pages 94, 95 and 96, it cannot be held that in deciding the *Middletown* cases the Supreme Court of Ohio had in mind any legislative act of abandonment of the part of the canal on which the water power in question in those cases was located, that part of the canal being the part extending from a point 560 feet north of the state dam near the corporation line of the City of Middletown, Ohio, to the present terminus of the canal at St. Bernard in the City of Cincinnati, Hamilton County, Ohio. (Par. 38, Appendix Principal Brief, 236.)

Appellants rely on paragraph 2 of the syllabus of the case of *B. & O. R. R. Co. vs. Baillie*, 112 O. S. 567, which reads as follows:

> "2. The syllabus of a decision of the Supreme Court of Ohio definitely states the law of Ohio with reference to the facts upon which it is predicated, and must be read in view of the facts found in such case."

And relying upon the rule of the Supreme Court of Ohio as an abstract proposition that the law decided by that court in a case before it is declared in the syllabus, counsel for appellants claim that the syllabus of the early cases upon which they rely, namely, the *Hubbard*, *Elevator*, *Fox* and *Walsh* cases, *supra*, respectively, control in the instant case. The same claim was made by counsel in the case of *B. & O. R. R. Co. vs. Baillie*, *supra*,

with respect to the syllabus in an earlier case, namely, *Loftus vs. Pennsylvania Railroad Co.*, 107 O. S. 352, but in the opinion of the *Baillie* case, 112 O. S. 570, the Supreme Court of Ohio states the situation with respect to the *Loftus* case, in the following language:

> "It is now claimed that the language there employed, not only in the opinion, but in the syllabus, is so broad and comprehensive that the decision of this court in that case is also determinative of the question presented by the motion to quash in this case. Because the state of facts here presented is so different from that before the court in the *Loftus* case, the syllabus of that case cannot be regarded as determinative of the issues presented in the instant case. The syllabus of a case definitely states the law with reference to the facts upon which it is predicated, and must be read in view of the facts found in such case."

Now, if the contention of counsel for appellants is the law governing the instant case, then the Supreme Court of Ohio could not have stated the law as it did state it with respect to the third defense in the *Middletown* case, 114 O. S. 441, 442, 457 and 458, nor could it have written the third paragraph of the syllabus in that case in the form in which it is written, page 438. Furthermore, on the theory of counsel for appellants, the Supreme Court of Ohio could not have decided in the second *Middletown* case, 116 O. S. 26, 27, as it did there decide (but without writing a syllabus) that the State of Ohio was entitled, authorized, had the power, to continue to use all the water it had formerly taken for navigation purposes on the Miami and Erie Canal, namely, 8,000 cubic feet per minute, and supply the same to private individuals for hydraulic purposes although navi-

gation on that canal had been abandoned by non-user long prior to the time of those decisions.

In the first *Middletown* case it was admitted in the pleadings that navigation had been abandoned through non-user of the canal for that purpose, and it was admitted that the state had permitted bridges to be built across the canal and that it did not intend ever again to use it for navigation purposes. The law making body of the state, however, up to that time had never made any declaration of abandonment with respect to the part of the canal in question in that case. In the instant case it is specifically alleged in the bill of complaint (R. 4, 5) that navigation on the canal had almost ceased prior to the year 1894 (and this was prior to the execution of appellee's first and principal contract, the Law lease) (R. 68), and this fact is specifically admitted by appellants, third paragraph of the answer (R. 29, 30) and it is admitted in appellants' statement of points (R. 196).

The third paragraph of the syllabus in the *Middletown* case states the law of Ohio "with reference to the facts upon which it is predicated and must be read in view of the facts found in such case." The applicable facts found in that case, admitted in the case under the third defense interposed by the Hydraulic Company to the action of the state, were that navigation on the Miami and Erie Canal had been abandoned long prior to the institution of the case from the State Dam near Middletown northwardly; that the state was then diverting from the Miami River above the State Dam larger quantities of water than it was entitled to have under the terms of the act permitting the appropriation of water for canal purposes and under its contract with

Enoch; that the state had abandoned for navigation purposes the Miami and Erie Canal from the State Dam southwardly to the City of Cincinnati and had permitted bridges, viaducts and other constructions to be built across the canal that make it impossible to use the same for navigation purposes; that since 1913 no portion of the canal had been used for navigation; that it was not the intention of the state to again use the canal for that purpose; and that the purpose of the construction of the canal had entirely ceased. (*Middletown* case, 114 O. S. 441, 442.)

The Hydraulic Company in its third defense did not allege that the legislature had ever passed an abandonment act affecting this part of the Miami and Erie Canal or that it had ever passed any act permitting bridges to be constructed across the canal in a way inconsistent with navigation. The facts are that no such an act, either of abandonment or to permit bridges or other obstructions on or over the canal preventing navigation, was ever passed prior to the decision of that case.

The mere statement of the facts as above related, it seems to us clearly demonstrates that the third paragraph of the syllabus of the *Middletown* case was based and definitely rests upon those facts, the principal one of which is that navigation on the Miami and Erie Canal had been abandoned through non-user of that canal by the public for navigation, and it must be concluded that as a matter of law the state had passed from the status of ownership of this property in its governmental or public capacity to the status of ownership thereof in its proprietary or private capacity.

The Supreme Court of Ohio in the two *Middletown* cases has held that the State of Ohio does have power and is authorized to continue to take water from the source of supply through the canal and supply the same to private individuals for hydraulic purposes in operating manufacturing plants or other industries, and this although such water was originally taken for navigation purposes and although it is no longer used for that purpose because the public long ago refused so to use it—in other words, although the canal was long ago abandoned for navigation purposes, not through any declaration of the legislature of the state but simply because the original, principal purpose of the construction of the canal, navigation, had entirely ceased.

Under the law as declared in the case of *B. & O. R. R. Co. vs. Baillie*, 112 O. S. 567, 570, the syllabus paragraphs of the earlier cases relied upon by counsel for appellants, namely, the *Hubbard*, *Elevator* and *Fox* cases, *supra*, must be held to state the law of Ohio with reference to the respective facts upon which those cases respectively are predicated and must be read in view of the facts found in those cases respectively. The facts found in each of those cases are widely different from the facts involved in the instant case. We have definitely pointed out those differences in our principal brief and deem it unnecessary to restate such differences here.

So far as the state's status and function as an owner and operator of the Miami and Erie Canal lands and the canal are concerned, its status in the instant case is exactly the same as in the *Middletown* cases. Counsel for appellants, except the present attorney general, have claimed that by the mere passage of an act by the Gen-

eral Assembly declaring an abandonment, officially as they term it, the state may restore to itself the function or status of ownership and operation of the canal in a public or governmental capacity, notwithstanding any contracts that may have been made with its citizens during the time when it was clearly functioning in such ownership and operation in its proprietary or private capacity.

If the contention is right that the state could do such a thing or take such action as next above described, then (1) notwithstanding the fact that navigation was abandoned prior to the existence of appellee's contracts and that the legislature, through the Act of 1830, re-enacted in 1840, and the Act of 1902, expressly delegated power to the commissioners and board of public works to readjust the rentals and compensation to be paid to the state by appellee for the time yet to run of its respective contracts and therein ordered such revision and readjustment, and (2) notwithstanding the readjustment described in our principal brief was made with appellee and imposed upon it in addition to all other increased burdens the obligation to expend $53,000.00 in actually improving the state's property, making it a vastly better property, and (3) notwithstanding appellee faithfully performed that obligation, nevertheless the state would have had the power, immediately after such readjustment and immediately after appellee had improved the property of the state by such expenditure, to declare the abandonment of navigation, already abandoned years prior thereto, and to take the water out of the canal and leave appellee wholly without remedy either at law or in equity.

In their statement of points (R. 196) counsel for appellants say that:

> "The state by receiving rents on account of water leases cannot thereby change to a public purpose the incidental use of supplying of water to holders of the leases; such incidental use of the canal is a private use as distinguished from a public one and continues as such notwithstanding the acts of any officers of the state."

We agree that in making such contracts as those of appellee the state acted in its proprietary or private capacity. It began that business through the Act of 1828 (Appendix Principal Brief, par. 11, p. 206) three years after authorization of the construction of the canals by the Act of February 4, 1825, and has continued such business under the Act of 1830 (Appendix Principal Brief, par. 15, p. 208) re-enacted as the Act of 1840 (Appendix Principal Brief, par. 27, p. 215) down to the present time, over one hundred years. The decline of navigation must have begun prior to 1861 when the state leased all its public works to private individuals, and surely it was declining when the Acts of 1863 and 1864 abandoning the southerly and northerly ends of the canal were passed. This decline in navigation steadily continued according to the admission in the record, until when, prior to the year 1894, it ceased. It has never been revived.

C. Appellant's Attitude Toward Abandonment and the Request of His Counsel to Amend His Answer:

Counsel for appellant along with their memorandum reply brief filed under permission from this court,

have also filed a motion asking permission to amend their answer in the particulars shown on page 2 of the printed motion. Their request in brief is that they be allowed to amend the answer denying that navigation on the canal almost disappeared prior to 1894 and ceased prior to 1900 and to show a table exhibiting tolls received beginning with the year 1894 and ending with the year 1918 on the Miami and Erie Canal for freight transportation. While these facts and this memorandum come as a surprise to us, we do not object to the amendment if this court at this late date shall see fit to grant the same. So far as we are concerned the court may assume that the table is correct.

Counsel for appellant in their reply memorandum and in the motion insist that the facts as to these tolls are not material, and under all the circumstances of this case we claim that the receipt of the tolls as shown by the table does not affect the soundness of our contention that this canal had in effect and as a matter of fact been abandoned as a public highway for transportation. The table of tolls itself on its face shows that the canal was doomed as a utility for transportation. This canal on its completion in 1845 extended from its connection with the Ohio River on the south, northerly through the cities of Cincinnati, Middletown, Dayton, Defiance and Toledo to Lake Erie on the north, a distance of approximately 225 miles. The table only indicates that beginning with the year 1894 there were some canal boats on this canal not yet worn out and there were a few people yet transporting some freight by means of those boats. The amount of tolls, however, rapidly declined practically with each succeeding year down to 1915, when the re-

ceipts were $1.09, with the years 1908, 1911 and 1917 showing nothing in the way of receipts. It cannot be presumed that the state, if it received any tolls, did not keep account of the same. The table of tolls definitely, but only, shows the winding up of a business that had failed.

It is true the state constructed this canal for the benefit of the public in transportation. So long as navigation continued the state owned and operated it for the benefit of the public at large. Suppose that when the canal was completed in 1845, the state's ownership thereof was so impressed with a public trust or use for the purposes of navigation that the legislature of the state did not have the power to abandon it for navigation and devote the property to some other use because demand by the public was great for the use of it in transportation. We are not conceding that the legislature would not have had the power even under these circumstances to have devoted the property to other use. We are assuming the proposition only for the purpose of argument. It, of course, will not be claimed by anybody, however, that if the public, for whose benefit the canal was constructed and for whose benefit its ownership became so impressed with a public trust or use, waived its right thereto, if such right existed, and refused or failed further so to use the property, the legislature would not have the power to devote it to some other use. It, of course, will not be claimed by anybody that the state in the case of such refusal, failure or abandonment by the public would be compelled, because of lack of power to dispose of it, to continue to hold this property in the hope of a realization of a possibility that the public at

some future date might again desire to utilize the property in public transportation. Abandonment of this property for public transportation is exactly what happened to it. The table of tolls exhibited by counsel for appellants does not in any way refute this last statement. All the table does is to prove the statement. For the purposes of our contention and argument in the light of the legislative and operative history of the canal, the public had in effect abandoned this property for transportation prior to the year 1894. Any person knowing the extent of this property would know and the court will take judicial notice of the fact that the toll receipts for the year 1894 could not be more than a small fraction of the cost and expense of maintenance of the property. With three or four exceptions the receipts in no year thereafter totalled the receipts of its preceding year. With those exceptions the receipts from each year were substantially lower than the receipts of the preceding year. The table clearly shows that no new equipment went into operation in any year, or if any such equipment did go into operation it went also to failure and total loss. The public therefore did abandon this canal for navigation purposes. It absolutely waived the public use with which the property was impressed, if it ever was so impressed.

There are certain powers of a government against the exercise of which the state may not contract and from the exercise of which it may not escape in a legal sense and continue to answer the purposes of government. It may not escape the exercise of its police power in its public governmental capacity but in proper cases it may even contract against its power of taxation. The

handling by Ohio, however, of this Miami and Erie Canal property never was and is not done under its police power. When the public abandoned the property for transportation, waived its right to have it remain impressed, if it ever was so impressed, with a public use, namely, a use for transportation, then the state as a sovereign state was authorized to use this property in such a way as it might deem to be for the best interests of the state and her citizens.

But the ownership of this property by the state never was impressed with a public trust or use preventing it from abandoning any part of the canal and selling the same free of both public and private use. That proposition being true and sound in law, then the state as a sovereign state must be held to have the power to deal with these canal lands and the canal and water thereof in its proprietary or private capacity and to make contracts with individuals binding upon both the state and the individuals, the same as may be done between private individuals themselves. This is clearly established by the case of *Railroad Co. vs. The State ex rel.*, 85 O. S. 251, 296, involving the sale through legislative act of the north two and seven-eighths miles of the northern division of the Ohio Canal at Cleveland. On page 296 of the report of this case the Supreme Court of Ohio uses the following language:

> "But the state in its proprietary capacity is amenable—if we assume that there was a departure from the designated use—to the rule well established in this state, that however it may be with respect to deeds of gift, where deeds rest upon a valuable consideration and a statement of inducements or purpose with respect to the use of prop-

erty granted, is disregarded, title will not revest in the grantor unless it be in pursuance of a stipulation in the grant that it shall revest."

In the instant case a valuable consideration passed from appellee to the state in appellee's assumption and performance of the entire cost and expense of the maintenance of the property from where it connects with the Maumee River above the Grand Rapids State Dam, including the dam itself, northeasterly to Lock No. 45, northeasterly of the hydro-electric plant, and the agreement by appellee followed by full performance thereof to make of the state's property a vastly better property, which performance appellee did at a cost to it of $53,000.00. The consideration passing from appellee to the state is clearly shown by appellee's contracts, Stipulation Exhibit No. 1 (R. 68, 70, 71) and Stipulation Exhibit No. 2 (R. 74-76).

The state acted in its proprietary or private capacity when it turned over to the City of Cincinnati the south end of the canal, extending from the Ohio River northerly in that city to the east side of Broadway. This was done under the first abandonment act (Appendix, p. 221). The same was done with the north end of the canal, extending from Lake Erie southerly to the northerly end of Lineal Part 1. This was done under the second abandonment act (Appendix, p. 223). *Malone vs. Toledo*, 34 O. S. 541.

This power was also exercised by the state when it sold Lineal Part 1 in question in this case under the Act of January 22, 1920 (Appendix, p. 225). This is the act under which Toledo purchased Lineal Part 1 and the act was construed in the case of *The Maumee Valley*

Electric Co. vs. Toledo, 13 Fed. (2d Series) 98-105. The state also acted in the exercise of this power when it passed the Act of March 27, 1925, offering Lineal Part 2 of the canal, directly in question here, for sale to the commissioners of Lucas County, Ohio (Appendix, p 230). *Appleby vs. New York*, 271 U. S. 364, 399; 70 Law Ed. 992, 1007. *State ex rel. vs. Middletown*, 114 O. S. 437.

D. Upon Abandonment of Navigation by the Public, or at Least When Abandonment Became Inevitable, the State Then Provided for Other Use of the Property:

When the public had practically abandoned the Miami and Erie Canal for navigation purposes, with total cessation inevitable, the state attempted to revive navigation, but in the same legislation it provided for other uses to be made of the property in case the public should not return to the principal use. We do not know whether any of the parties opposed to appellee in the litigation over its rights had ever heard of the legislative acts we are about to mention and have already mentioned in our principal brief, but the facts are that from the beginning we have cited these acts as attempts on the part of the state to revive navigation and at the same time through one of those acts to provide for the use of the property if the public should continue in its refusal to use it for navigation. The first act to which we refer is known as the "Electric Mule Act," passed April 25, 1898, (Appendix, p. 244). This act wholly failed of its purpose. The second attempt by the legislature to revive navigation was the act passed April 9, 1902, (Appendix, p. 246). This

act declared that the Miami and Erie Canal, together with its water supplies, reservoirs, etc., should be retained and maintained as a public canal. It also provided that if anybody would put boats on the canal the state would pay the value thereof if it should ever abandon navigation rendering the boats useless. All we need to prove that both of these acts failed is the table of tolls now submitted by counsel for appellant. But in passing this act the legislature was wise in its provisions for the inevitable failure in its efforts to revive navigation. In Section 4 of that Act the General Assembly authorized and commanded the Board of Commissioners, together with the Board of Public Works, to investigate all the then present water rate contracts on the Miami and Erie Canal and the northern division of the Ohio Canal and revise and readjust them upon a fair and equitable basis as to rentals to be paid in the future. Appellee's principal lease, Stipulation Exhibit No. 1, (R. 68) was then in existence, owned by appellee. That lease was revised, readjusted, modified in pursuance of that Act, supplementing the broad powers conferred by the Act of 1830, (Appendix, p. 208) re-enacted in 1840 (Appendix, p. 216), retained and carried as the law down to March 21, 1917 (Appendix, pp. 217, 218). This later Act of 1902, therefore, did two things, (1) it encouraged users of hydraulic power to make contracts therefor with the state because in Section 1 of that Act the legislature declared it to be the settled policy of the state that the Miami and Erie Canal, together with its water supplies, reservoirs, dams, feeders and adjacent lands from Cincinnati to Toledo, would be retained and maintained as a public canal, and (2) in Section 4 it authorized and commanded the Board

of Public Works to revise and readjust all then existing water rate contracts upon a fair and equitable basis as to to the rents to be paid by the lessees to the state for the future running of those contracts.

With appellee relying (R. 161, 162) on those statutes, the readjustment of appellee's principal contract, Stipulation Exhibit No. 1, (R. 68) was accomplished through the supplementary agreement modifying the principal contract, Stipulation Exhibit No. 2, (R. 74). Appellee, relying upon the laws passed by the legislature as mentioned above, did all the things for the state and for itself at a large expenditure of money, which we have already discussed and shown herein and in our principal brief.

E. The Attorney General, Present Counsel for Appellant Kirk, Admits That the Ownership of the Property in Question Here Is Not Impressed With a Public Use Preventing the Making of Such Contracts as Those of Appellee Through Legislative Act Direct, or Properly Delegated Authority, But He Contends That Appellee's Contracts as Such Are, in Their Terms and Under the Circumstances of Their Existence, the Same as the Contracts Involved in the Earlier Cases on Which He Relies and Therefore Ruled by Those Cases:

In all the litigation in which opponents of appellee have involved it since the fore part of 1925, respecting appellee's rights under its contracts, up until now the claim has been made by such opponents that the ownership of the Miami and Erie Canal lands and the waters

thereof was impressed with a public use preventing the state from making valid contracts, such as those of appellee, extending for terms beyond a time when navigation should cease on the canal either through non-user or through declaration of a legislative act. The present attorney general is the first to take the position indicated in the above heading. We have always contended for appellee that the ownership of the property was not impressed with a public use preventing appellee's contracts as valid contracts according to their terms, and we have also always claimed that those contracts in themselves and the circumstances out of which they arise are essentially different from the contracts involved in the earlier cases and therefore are not ruled by those cases.

On pages 2 to 7 of the memorandum reply brief of appellant, counsel attempt to show that appellee's contracts are the same as the contracts involved in the earlier cases on which they rely. There were no doubt some provisions in the leases considered in those earlier cases the same as appear in the contracts of appellee. The statute of 1830 as re-enacted in 1840 required a certain reservation to be written into every contract. That requirement was that each contract should contain a reservation to provide that if the state should ever find it necessary to resume the water called for in the particular contract in any case for the *purpose of navigation* then the state could so resume. No other reservation is required. It is not likely that in executing contracts the board of public works without legislative authority would depart from the specific requirements in those statutes. We understand they never have so departed. There is one dominant and all-important pro-

vision, however, in appellee's contracts which evidently did not appear in the contracts considered in the earlier cases. That provision (not specifically required by statute) is the one which places upon appellee the duty and obligation of bearing the entire cost and expense of the maintenance of the Miami and Erie Canal from where it connects with the Maumee River above the Grand Rapids State Dam northeasterly to Lock 45, three-quarters of a mile north of the hydro-electric plant at Maumee. (R. 70-71.) And this includes, of course, the Grand Rapids State Dam.

Appellee's supplementary lease and agreement is wholly different from any of the contracts involved in the earlier cases. It is like appellee's principal contract, which it modifies, in that in this supplementary agreement appellee reassumes the cost and expense of the entire maintenance of this canal. In addition to that it is different from any of the other contracts, in that through it it obligated itself at the request of the board of public works in the readjustment and revision of the Law lease greatly to improve the state's property. This improvement of the state's property was to be done by appellee at its own cost and expense by removing rock bars in the canal near the Village of Waterville and all other obstructions therefrom on the eighteen-mile level and to raise the banks of the canal from the point where it joins the Maumee River above Grand Rapids State Dam northeasterly to Lock 45 in the Village of Maumee. No such obligation was put upon, or assumed or performed by the lessees under the contracts involved in the earlier cases. Appellee performed this work at its own cost and expense in the sum of $53,000.00. In addition to the

above, appellee was required to pay the compensation of three patrolmen to be appointed by the state to patrol this canal from Grand Rapids to Lock 45 in order to prevent breaks in the canal banks, repair leaks, remove logs, brush and other impediments to the free and even flow of the water in the canal. Through this supplementary agreement it was agreed between the parties that the service rendered under the terms of the principal lease was unsatisfactory and that the compensation named in that lease was inadequate for proper and satisfactory service. In all these respects, just mentioned, appellee's principal lease and this supplementary agreement were essentially different from the provisions of the leases involved in the earlier cases. (R. 74, 75.) In consideration of these promises and the performance thereof by appellee, the state agreed to cause to be let into the eighteen-mile level of the canal at Grand Rapids, from the pool above, waters of the Maumee River equal to the safe capacity of the canal for use for hydraulic purposes at the works of the company located near Maumee. No such a provision as this appeared in the leases involved in the earlier cases.

In appellee's principal lease it is specifically provided that if appellee shall fail to maintain the canal from Grand Rapids to Lock 45 by keeping in repair the weir, head and tail race, "and all *other works and devices* connected with the use of the water hereby leased," then the state might perform the work, charge the cost and expense thereof to appellee, and in the lease appellee agrees in such a case to pay such cost and expense to the state on its demand (R. 70, 71). No such provision as this appeared in the earlier leases. When the attor-

ney general therefore in his memorandum reply, on pages 4 and 5, says that in appellee's contracts there was no agreement actually to deliver water under such contracts, he is plainly in error. In consideration of the work and other things which appellee agrees under the supplementary agreement to do for the state, the state does agree as stated above to cause to be let into the eighteen-mile level, being all of Lineal Part 2 and the south 1.6 miles of Lineal Part 1 of this canal, from the pool above the Grand Rapids Dam, waters of the Maumee River equal to the safe capacity of the canal, to be used by appellee for hydraulic purposes at its works located in Maumee. True, this clause says this will be done consistent with the rights of navigation upon the canal. At the time this supplementary agreement was executed, however, there was no navigation upon this canal in the true sense. Even according to counsel's table of tolls, there existed at that time in the matter of navigation only the winding up of a business that had failed.

Counsel reminds us that the earlier cases held that the lessees in the contracts involved in those cases were mere licensees or privilegees. The answer to this is that when those earlier leases were written navigation was in progress upon the Miami and Erie Canal from its connection with the Ohio River on the south to its connection with Lake Erie on the north, and after the southern end in Cincinnati and the northern end in Toledo had been abandoned navigation still went on from Toledo on the north to Cincinnati at the south. Nobody would claim that under the statute of 1830, as re-enacted in 1840, the board of public works had power to make a contract leasing or selling such an amount of water as would

destroy, or even hinder navigation. These statutes expressly provided against that by requiring a reservation in every lease giving the state the right to resume any water leased or sold in case the same should become necessary for *navigation.*

True, when the *Hubbard, Fox* and *Elevator* cases arose and were decided the southerly end in Cincinnati of the canal and its northerly end in Toledo had been abandoned by the first two abandonment acts, respectively. As already shown, there was no provision in either of the leases involved putting the maintenance of the canal upon the lessee, and the court in those cases held that under such circumstances it would not require the State of Ohio to incur the cost and expense of keeping up the canal simply for a small hydraulic power. The court said that the statutes of 1830 and 1840 should not under such circumstances be construed as conferring so broad a power upon the board of public works as would permit that board to impose such a burden upon the state.

In the instant case, however, an entirely different situation appears. When appellee's principal lease was written the Miami and Erie Canal had become useless as a means of canal transportation. The state's business as a public carrier through navigation had failed. This fact was known to the General Assembly and to everybody. Complete cessation was only a matter of winding up. Railroad deevlopment had progressed to a status where canal transportation under commercial and social conditions of that time was simply impossible. The state did not allow this situation to pass without notice and without effort to revive navigation through

some concessions more favorable than had ever up to that time been made. Accordingly, the legislature passed the Electric Mule Act. This act proved of no avail whatever. In this state of affairs came the Act of 1902 from the legislature as another and the final and a liberal offer to the public as an inducement to it to return to this canal as a utility for navigation. It was no inducement. In that act, however, the legislature made provision calculated by it to avert total loss of the property. Through Section 1 of that act (Appendix, p. 246) the legislature published to the citizens of Ohio its declaration that it was the settled policy of the state that this canal, together with its water supplies, reservoirs, dams, feeders and adjacent lands from Cincinnati to Toledo should be retained and maintained as a public canal. The attorney general, giving his legal philosophy as to the earlier decisions on the contracts involved in them (p. 5 of his memorandum reply brief), says that the early contracts were construed in the light of the fact that the state might want to abandon the canals, and he said, "If no canal, no water." We would say also, "If no canal, no navigation, but there may be no navigation and still there may be a canal." This exactly describes the situation with respect to this canal when the Act of 1902 was passed. Although there was no navigation, this act said to everybody there will still be a canal. And then in Section 4 the legislature directs the state's board of commissioners and public works to go to every owner of a water contract at that time on the Miami and Erie Canal and the northern division of the Ohio Canal (Appendix, p. 247) and say to such owner, the state commands us to revise and readjust your con-

tract upon a fair and equitable basis as to the compensation you shall pay to the state for the future running of your contract. The legislature, however, did not change the Acts of 1830 and 1840 giving the board of public works broad discretionary power to make such contracts upon such terms and conditions as the board might deem for the best interests of the state and to grant such contracts, either in perpetuity or for a limited number of years, upon a certain annual rent, *or otherwise.* The state allowed those statutes to stand in their broad terms from 1830 to 1917 and then it amended them only in that it limited the terms for which such contracts might be written to a maximum period of twenty-five years.

It is significant that after the statute of 1830 was passed it was re-enacted without change in 1840, except to designate the board of commissioners as board of public works. Thereafter it was incorporated into the Revised Statutes of Ohio of 1880 as Sections 7775 to 7779, respectively, and thereafter it was carried by the legislature into the General Code of Ohio of 1910 as Sections 14009 to 14013 (Appendix, pp. 216, 217).

And so with navigation gone the legislature of the state through the Act of 1902 advised everybody that it would retain and maintain the Miami and Erie Canal as a public canal, and through Section 4 it said plainly in effect to every owner of a water contract on that canal, we recognize your contracts and now that navigation is gone we want to give the best service we can give through this property for hydraulic power and thereby, through a readustment and revision of your contracts, procure more money for the state. No such circumstances or sit-

nation as that described above obtained with respect to the contracts passed upon in the earlier cases.

Suppose that an individual or a private corporation were operating a private canal for navigation and furnishing water for hydraulic power; that the business of navigation had failed or was in rapid, noticeable decline and that complete cessation of navigation within a short time were certain; that such private owner and operator should represent and publish to the public that even though navigation had ceased or it was inevitable that it soon would pass to complete cessation, his private canal would still be retained and maintained as a canal; and that he should go to all of his customers, users of water from his canal for hydraulic purposes, and say to them, I want to give you better service in the use of water for hydraulic power, but now that the other branch of my business, navigation, is gone, or is sure soon to cease, I must raise the compensation which you shall pay to me for the improved service which I will give you throughout the future running of your contracts, in the furnishing of water for the operation of your hydro-electric plants or other industries; in short, suppose that such private owner and operator should do exactly what the State of Ohio did in the instant case and that all or any one of his then present customers, because of his public publication and representation as to his proposed continuance and maintenance of his canal and of his negotiation on his own motion for higher compensation, should have revised and readjusted their contracts with him, and therein agreed to pay him largely increased compensation, and under the requirement of such contracts, as revised, spend large amounts of money in im-

proving, making better, his canal property, agreeing therein to maintain the same at their own expense, and in improving and extending their own plants at great cost, we ask whether such a contract as that would be enforced by the courts through judicial proceedings, either at law or in equity. The mere statement of the question compels an answer in the affirmative.

Since it is conceded by the attorney general that while the state in making these contracts acted in its capacity as a sovereign state that fact does not give it a right to violate such contracts as are in question here, then the state must stand in the same relation to appellee and its contracts with the state as the above supposed private individual would stand with respect to his above supposed contracts. The only difference is that appellee may not proceed against the state for damages because there is no statute in Ohio permitting such an action against the state. Appellee's only remedy is by injunction. (Our Principal Brief, 163.) *Rodebaugh vs. State*, 96 O. S. 513.

F. After the Execution of Appellee's Contracts, They Were Ratified, Approved and Confirmed:

Appellee's principal lease, the Law lease, was executed under the power granted through the Act of 1830 (Appendix 208) re-enacted in the Act of 1840 (Appendix 216). It was thereafter approved, ratified and confirmed by Section 4 of the Act of 1902 (Appendix 247). In that section of the Act the legislature of Ohio commanded the administrative board to investigate all then existing water rate contracts on the Miami and Erie Canal and

the northern division of the Ohio Canal, and revise and readjust them upon a fair and equitable basis as to the rents to be paid in the future.

In pursuance of those acts appellee acquired all its other contracts, Stipulation Exhibits 2 to 7, inclusive (R. 74 to 101).

All of appellee's contracts were approved, ratified and confirmed by the Act of January 22, 1920 (Appendix, p. 225).

They were again approved, ratified and confirmed by the Act of March 27, 1925 (Appendix, p. 230).

That the State of Ohio had the power thus to ratify, approve and confirm appellee's contracts there, of course, can be no doubt.

> Maumee Valley Electric Co. vs. Toledo, 13 Fed. (2nd) 98-105.
>
> Jefferson City Gas Light Co. vs. Clark, 95 U. S. 644, 645, 655; 24 Law Ed. 521, 523.
>
> Chucco Tioco vs. Forbes, 228 U. S. 549, 555, 556; 57 Law Ed. 960, 964.

So that if there was any defect of power in the board of public works to execute appellee's contracts as valid and binding contracts upon the state and appellee, that defect was cured by the acts of the legislature cited above.

G. By the Established Principles of Equitable Estoppel the State Is Prohibited From Taking the Action Sought By It to Be Taken Through the Act Attacked in This Case, and That Act Must Be Held to Be Null and Void as Violating the Contract and Due Process Clauses of the Federal Constitution With Respect to Appellee's Contracts:

We have discussed this subject in our principal brief (pp. 167 and 168) but here we would add in further support of our contention in the above heading, that the situation is as follows:

The state by enacting, re-enacting and retaining the statute of 1830 (Appendix, 208, 216) and carrying that statute with its broad powers thereby granted to the state's agency, the board of public works, into the Revised Statutes of 1880 and the General Code of 1910 down to March 21, 1917 (Appendix, 217), a period of eighty-seven years, certainly gave the public in Ohio to understand that it believed those statutes sufficient and proper for the delegation of powers to that agency authorizing the agency to deal with the citizens of the state on the subjects covered thereby; and what would be more natural than for individuals to believe that the state meant for the agency to deal with the individual in the light of and having reference to the conditions prevailing at the time of such dealing of the Miami and Erie Canal lands and the waters thereof belonging to the State of Ohio? The statute of 1830 expressly gave power to the state's agency to execute such contracts as those of appellee for a *limited number of years* or in *perpetuity* at a certain annual rent, *or otherwise*. This statute was

never changed, as stated above, until 1917, and then it was changed only in that it provided that from that year on future contracts should not be made under the statute for a longer term than twenty-five years. In 1917 navigation was gone even according to the table of tolls submitted by the attorney general.

We have shown in our principal brief that the State of Ohio began making such contracts as those of appellee with individuals on and along all of the canals of the state, and that practice has continued until the present time at all points where hydraulic power had been developed. The only express reservation required by the statute to be placed in each contract was a reservation that if the water taken under the contract in any case should at any time be deemed necessary for *navigation*, the state should be at liberty to cancel the contract. No one of the acts of abandonment discussed in this case, including the Act attacked here, was passed for the purposes of navigation. Upon the passage of each of those Acts navigation on the part of the canal affected thereby was, of course, at an end. Yet through all these years the statute of 1830 was kept in force through its enactment and re-enactments as above described.

Now with that legislative history of the canal and with the operative history thereof in navigation in the mind of the general assembly (the operative history being that navigation in the later years had utterly failed and passed in fact, not to be revived as a business) nevertheless the legislature in 1898 passed the Electric Mule Act and in 1902 it passed the Act of that year (Appendix, 244, 246), the sole purpose of the Electric Mule Act being an attempt to revive navigation, and one of the purposes

of the Act of 1902 being another and the last attempt to rehabilitate the business. Through these Acts the legislature administered the last "death bed stimulant" to a business that had failed and was winding up.

Under this discussion let us see just exactly what the state did to induce its citizens to continue the making of contracts with it for hydraulic power. In Section 1 of the Act of 1902 it announced and declared to all citizens in Ohio that it was "the settled policy of this state that the Miami and Erie Canal, together with its water supplies, reservoirs, dams, feeders and adjacent lands from Cincinnati to Toledo, shall be retained and maintained as a public canal," and it declared and announced the same thing with respect to the northern division of the Ohio Canal. Keeping in mind the fact that navigation had failed and as subsequent events have shown it was then certain of early complete cessation, and keeping in mind of course that that fact was known to all the citizens of Ohio, was common knowledge, what would be more natural than for such citizens to feel that because of the declaration above quoted there would still be a canal although on it there would be no navigation?

The next thing the state did in this act was accomplished in Section 4 thereof. In that section the legislature in effect said to its agency, the board of public works, you are authorized and you shall go to each and all the owners of water rate contracts on the Miami and Erie Canal and the northern division of the Ohio Canal and revise and readjust them upon a fair and equitable basis as to the rents those owners shall pay under those contracts through the future running thereof, and as a guide to you in making those contracts we leave in force

the old statutes giving you power to make these contracts for a limited number of years or in perpetuity, for hydraulic purposes, under such conditions and reservations as you may think necessary and proper "for a certain annual rent, or otherwise," as you may deem most beneficial for the interests of the state (Appendix, 247, 208).

When appellee acquired its principal lease in 1900 (R. 68) and again when it acquired the supplementary agreement (R. 74) it relied upon the practice of the state established in 1825 and followed through all the years subsequent thereto down to the acquirement of those contracts by appellee, and it especially relied upon the Act of 1902 (R. 161). Thus relying upon the Act of 1902, passed, declared and published to the public and expressly extending authority to the state's agency, as shown by the Act, appellee entered into the supplementary agreement, through which it obligated itself to pay greatly increased rentals over what it had theretofore been paying to the state, reassume the maintenance at its own sole cost and expense of all of this canal, designated by us as Lineal Part 2 and the southwesterly end of Lineal Part 1 to Lock 45, and agreed greatly to improve this property for the state. It has faithfully performed each and every obligation put upon it or assumed by it in each and all of its contracts, and in that performance it expended strictly in accordance with the requirements of the state, the sum of $53,000.00 in improving the state's property, making a better property thereof so that the state could realize more revenue for itself and in the transaction escape all further expense as to maintenance of the property to the end of the terms provided for in the contracts. In consid-

eration of the obligations of appellee and its performance thereof, the state agreed to let into this canal property from the pool of the river above the dam for the use of appellee for hydraulic purposes at the hydro-electric plant in Maumee, generating electricity to be sold for light, heat and power to the public, all the water that the canal would safely carry. The state has complied with that obligation from the beginning until now, although, except for the proceedings by appellee in the instant case, it would have cut off the supply in accordance with the act attacked in this case, through which the state attempted to nullify, make void and repudiate appellee's contracts, formally entered into under authority of the law as heretofore related, statute law formally passed by the law-making body of the state, in an effort to build up for the state a revenue producing business in furnishing hydraulic power after the original business or purpose of the canal had failed. Relying upon the practice of the state under its laws formally passed as aforesaid, appellee not only complied with all the obligations put upon it or assumed by it under the contracts, but in accordance with the plan devised by the state's duly authorized agency and appellee it spent great amounts of money in extending its hydro-electric plant at Maumee from a small plant of four hundred water horse-power to a larger and efficient plant of twenty-seven hundred water horse-power, with a capacity of generating ten million kilowatt hours of electricity per year (R. 160-169).

The mere statement of the facts commands the application of all the principles of equitable estoppel against the state and the act attacked in this case. The instant case is different from the case of *Railroad Co. vs.*

State ex rel., 85 O. S. 251, only that in the latter case the state conveyed to the City of Cleveland the fee simple of the northern end of the Ohio Canal, while in the instant case it has granted for a term of years complete control and use of the property in question, Lineal Part 2 and the southwesterly 1.6 miles of Lineal Part 1, with all the water which the canal will safely carry from the pool of the Maumee River above the dam northeasterly through those parts to the hydro-electric plant in Maumee, excepting only therefrom such water as goes to The Providence Mill Company, at Providence, and to The Toledo Grain & Milling Company, at Toledo. *Los Angeles vs. L. A. C. Water Works Co.*, 177 U. S. 558, 583, 584; 44 Law Ed. 886.

H. The Contract Between Ohio and Toledo for the Benefit of Appellee and the Decision in Maumee Valley Electric Company vs. Toledo:

For appellee we claim that the obligations of the contract entered into between the State of Ohio and the City of Toledo in pursuance of the Act of January 22, 1920 (Par. 35, Appendix, 225) *for the benefit of appellee*, are impaired within the provisions of the contract clause of the Federal Constitution by the act attacked in this case (Par. 39, Appendix, 236), and that this last mentioned act violates Section 1 of the Fourteenth Amendment of the Constitution as depriving appellee of its property in that contract without due process of law. We have discussed this point beginning at page 168 of our principal brief where all the applicable decisions we have been able to find are cited and discussed. We shall not write much in addition here.

At pages 16 to 18 of his memorandum reply brief, the attorney general exhibits some discussion of the case of *The Maumee Valley Electric Company vs. Toledo*, 13 Fed. (2d) 98, which case established that contract. He calls attention to the language of the Act of January 22, 1920, which expressly provided that if Toledo should accept the grant, then it should "pay the water lessees a fair compensation for the loss of the water to which they are entitled," and he says that there are no such provisions in the act attacked in the instant case. That statement is true and its truth, or rather the fact that no such provisions do appear in the act giving rise to the instant case, is just the fact of which we were complaining. If the act complained of here contained provisions providing for compensation to be paid to appellee on the draining of the water from the Miami and Erie Canal and thus destroying appellee's water rights under its contracts, such compensation to be determined by agreement or through due process of law under the power of eminent domain, then we would have no ground for complaint. We complain of the act in question here because it arbitrarily attempts to declare all contracts null, void and of no effect and ruthlessly to destroy, confiscate, our property; property acquired on the representation and solicitation of the state, as already heretofore discussed herein and in the principal brief; property acquired as the result of compacts between appellee and the state carried forward to consummation under orderly and due forms of law. The Constitution is the state and in the higher and better conceptions by the citizens of the function of the state, he feels and he knows that the Constitution cannot nor does it do any wrong to the citizen.

The legislature, however, of the state is another matter. It may not, at any rate it will not be presumed to do intentionally a wrong to a citizen, but in its individual membership or in the body of the whole it often falls far short of the higher and better conception above mentioned, and in its action it does pass legislation which, if permitted to stand, would do great injustice to the citizen through violation even to the point of nullification and repudiation of his constitutional rights. The act in question in this case is in our mind without any doubt whatever such an act. It is that kind of an act with respect to the particular contract now under discussion. The attorney general, page 17 of his brief, says that Judge Knappen indicated in the decision in *Maumee Valley Electric Company vs. Toledo*, that there was no obligation on the state legislature in passing the Act of 1920 to protect the rights of the state's lessees under their existing leases of either lands or water or both and their rights to a renewal thereof, we using the language of the act. The facts are that Judge Knappen said exactly the opposite, and in saying it he used the following language:

> "It is enough that as we think it chose rather to recognize its moral obligation to respect the rights of its lessees, property holders and citizens."

(Principal Brief, 179.) This court has said in effect that the state may be indebted to a citizen through

> "debts or claims which rest upon a merely equitable or honorary obligation and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a debt to an individual when his claim grows

> out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature such as are binding on the conscience or the honor of an individual although the debt could obtain no recognition in a court of law."

(Principal Brief, 185.) It is true the State of Ohio was not a party to the case of *The Maumee Valley Electric Company vs. Toledo*, but it is true that it was a party to the contract between itself and Toledo entered into in behalf of and for the benefit of appellee. The attorney general says that in this case we are interested with legal and not moral obligations. We are surprised at this statement from the learned attorney general because moral obligations have ever had a place in equity jurisprudence. They always will have such place it equity jurisprudence shall endure.

Now let us at no time forget that the hydro-electric plant at Maumee is located on Lineal Part 1 of the canal which is the part purchased by Toledo under the Act of January 22, 1920, and in pursuance of which the contract between Ohio and Toledo for the benefit of appellee was entered into. Further, we must remember that all the water guaranteed by the state to appellee must be brought from the pool of the river above the Grand Rapids Dam northeasterly through Lineal Part 2 sought to be abandoned by the act attacked in this case and carried on over the southwesterly 1.6 miles of Lineal Part 1 purchased as aforesaid by Toledo. Toledo has claimed since the passage of the Act of 1920 that appellee and other lessees had no rights under that act and that they could have no rights as against any abandonment act.

That city has therefore involved appellee in long and expensive litigation in an effort to acquire Lineal Part 1 free from appellee's rights and without the additional cost which the Act of 1920 said Toledo should pay for Lineal Part 1, that is, a fair compensation to appellee for the water to which it is entitled under its contracts. When the city was defeated in the first litigation, *Maumee Valley Electric Company vs. Toledo, supra*, it then still refused to pay appellee any compensation or to settle with it in any respect, and it refuses to acquire appellee's rights through the power of eminent domain. Instead of complying with the contract into which it solemnly entered, as said by Judge Knappen in the opinion of the *Maumee Valley* case, it procured introduction into the legislature of Ohio of the act now in question. Toledo and Lucas County had five members in that General Assembly. The executive officers of Toledo, Lucas County commissioners, and the executive officers of the Villages of Maumee and Waterville, together with those five members of the General Assembly, diligently worked for and urged the passage of the act. The bill passed, was vetoed by the governor, and then those same executive officers and Lucas County's members of the General Assembly, some of them on the controlling committees of each house, lobbied through the bill over the veto of the governor. (Sec. 18; R. 66-67.) The bill on its face shows (Principal Brief, 192) in connection with the action above described, that this act was passed really simply for one purpose, namely, to allow Toledo to build a boulevard on that part of Lineal Part 1 of this canal which lies within the city limits of Toledo without complying with its contract to compensate appellee. The

westerly city limits of Toledo are about two miles easterly from the hydro-electric plant. Of course Toledo could not spend the money of the taxpayers of that city to build a boulevard beyond its limits.

Taking into consideration the Act of January 22, 1920, the deed from Ohio to Toledo (Stip. Exhibit No. 15, R. 133) for Lineal Part 1 issued under that act (Appendix, 225), together with the act attacked here (Appendix, 236) abandoning Lineal Part 2 of the canal, which part lies between the southwesterly end of Lineal Part 1 and the pool of the river above the dam and through which Lineal Part 2 and southwesterly 1 6/10 miles of Lineal Part 1 all the water must pass, it becomes perfectly apparent that the sole purpose of the act attacked in this case is to enable Toledo to build a boulevard on a part of Lineal Part 1 without complying with its contract to compensate appellee for its rights. The State of Ohio was a party to that contract and became a party to it recognizing its obligations to its lessees. We claimed in that first litigation that the state was legally bound to protect appellee and the other lessees on the canal and that if the Act of 1920 had not so protected appellee, then that act would have been unconstitutional. We made that claim on the principles and grounds forming the basis of our contention here.

One thing more, and that is that in that first litigation Toledo was and is permanently enjoined from interfering with appellee in the enjoyment of its water rights on this canal in any way until it should comply with its contract now under discussion, failing in which the water should continue to run in the canal to the hydro-electric plant. (Final Decree on Mandate, R. 138.) That de-

cree, based on the provisions of the legislative Act of 1920 solemnly passed by the State of Ohio, secures to appellee a complete remedy against invasion of its rights by the City of Toledo who seeks to confiscate and destroy them. The State of Ohio, through the act in question in this case, seeks to repudiate its action through the former act, to repudiate the contract into which it entered for the benefit of appellee, and finally to nullify and destroy the final decree and thereby wholly deprive appellee of any remedy either at law or in equity. The contract and due process clauses of the Constitution of the United States do not say that a contract made between two parties for the benefit of a third is not included within their protective provisions. Their provisions are general, and for ourselves we can conceive no argument or reason why the contract under discussion here must not be held to be within their provisions.

II

CASE NUMBER 675, OCTOBER TERM, 1928

A. The State's Title to the Water Power:

In respect of *The Providence Mill Company* case (No. 675) no adequate answer has been made on behalf of the state to the point made at pages 26 *et seq.* of appellee's brief, in substance, that the state's title to Minor's property was never more than a qualified fee, *i. e.*, a fee subject to Minor's fee simple title to the water power restored to him by the state's grant of September 1, 1842. In the *Middletown* case, 114 O. S. 437, the court expressly held the water power, reserved in part to

Enoch and conveyed in part by him to the state, to be *jointly* owned by them, such that the state could not thereafter deprive Enoch's successor of the water power. In this connection the court took pains to point out that there is no provision in the canal acts prohibiting the canal commissioners from taking less than a fee simple by gift or grant; that the court had not up to that time passed upon the rights of the commissioners to take less than a fee simple title and therefore there was nothing to prevent the court from holding, as it proceeded to do, that the occupancy and use of the water amounted to a joint tenancy between the state and Enoch's successor.

And as intending to clinch the nail, the court said in the *second Middletown* case (116 O. S. 26):

> "The state acquired its right, by grant from Abner Enoch, to a *joint use* with him of the water from the pool created by the brush dam, and a *joint use* with him of the mill race for canal navigation purposes. The state entered into such a *joint use*, and has continued ever since in such use under such grant. * * * The defendant *has title as against the state* to the use of 19,463.50 cubic feet of water per minute in excess of 8,000 cubic feet per minute, to which the state has title * * *."

If Enoch acquired a valid title in fee to the reserved part of the water and the state acquired title to the remainder under the circumstances in that case, we altogether fail to understand why, under the similar circumstances in the case at bar, Minor acquired any less title to the water restored to him by the grant of September 1, 1842, leaving title to the remainder of the water in the state as in the *Middletown* case.

So also, neither the argument nor the briefs on behalf of appellants have negatived the point made at pages 28 and 29 of the brief for appellees, in substance, that in order for the state's seizure of Minor's water power to have vested a fee simple title in the state it must have been clearly apparent from the facts that both the state and Minor knew or should have known at the time of the execution of the agreement of September 1, 1842, that the water had been appropriated in *fee simple* by virtue of the seizure.

Miller vs. Wisenberger, 61 O. S. 561.
Smith vs. State, 59 O. S. 278.

Applying the foregoing to the case at bar, we think it must be conceded that the occupancy by the state of Minor's water power and the land upon which it was located was not, nor was it intended to be, exclusive and in denial of the claimed rights of Minor. It is true that the state took possession of Minor's water power and the land occupied by him; it is true, also, that the taking of possession was for canal purposes. But when it is considered that, almost concurrently with the taking, the state restored to Minor the equivalent of his former water power and that in the same instrument (agreement of September 1, 1842) the state was careful to secure from Minor a *conveyance of all of his other property and rights*, the conclusion is irresistible that the state never intended to occupy Minor's water power to the exclusion of Minor himself, and that when the state, by the agreement of September 1, 1842, restored the water power to him, his heirs and assigns, it was consistent with one and only one theory, to-wit: that Minor

was to receive back his water power exactly as he had previously owned it, *i. e.*, in fee simple, subject only to its paramount use by the state for navigation purposes. And surely no one will seriously contend that the agreement of September 1, 1842, was merely by way of compensation for damages suffered by Minor for the seizure of his *mill;* he received a separate award of $2500 for that. Surely no one will contend that in compensation for his water power the state intended to give and Minor intended to receive a temporary water *lease* which (according to appellants' contention) might be terminated at any time by the state's abandonment of the canal. To the contrary it *must* have been the intention of the parties that Minor was to be vested in fee simple with the title to a definite amount of water, *i. e.*, sufficient to turn eight pairs of millstones, and that his rights in that respect were to be recognized by the state in perpetuity. If not, *i. e.*, if the state did not believe itself committed to restore and insure to Minor a definite amount of water in return for his conveyance of his claim against the state, why did the state subsequently, upon proof of its ability to furnish to Minor water sufficient to operate only three and one-half pairs of millstones, instead of the eight pairs of millstones specified in the agreement of September 1, 1842, pay to Minor on February 23, 1846, the sum of $2800 for "the damage sustained by the said Minor by the failure of the state to furnish the power • • • mentioned in said contract of September 1, 1842" (R. 47)? Why also did the state at the same time (February 23, 1846) confirm to Minor the water power conveyed as above noted and recite that the $2800 *plus the water power* should be in full liquidation of all of his

claims? The entire transaction is inconsistent with any theory except that the state felt itself bound to make settlement with Minor; that in settlement for the water power (as opposed to his claims for seizure of the saw-mill) the state intended to restore a part of the water power so seized and that in the event of any subsequent diminution of the water power so restored Minor or his successors would be entitled to compensation. The only possible answer of appellees to the foregoing proposition is that in return for Minor's valuable water power, mill race and land, all owned by him in fee prior to the coming of the canal, the state intended to grant and Minor intended to accept the right to use the canal water at the mere whim of the state, for a month, a year or a few years, depending upon when the state might elect to discontinue the canal. Every act of the parties was inconsistent with such an intention, and the only question left for determination, therefore, is as to the right of the canal commissioners to enter into an arrangement with Minor whereby the water power was to be enjoyed by them *jointly*. And the answer to that question is to be found in the *Middletown* case wherein the court expressly holds that the state's title in canal water created under almost exactly the same circumstances as the water in the case at bar, may be, and in that case was, one of joint ownership between the state and the successor in title of the original mill owner.

In order to vest in the state a fee simple title to lands for canal purposes "it would be necessary to show that a claimed occupancy by the state was an exclusive occupancy in order to bring the case within the letter of the proposition." *Smith vs. State*, 59 O. S. 278, 281.

In that case a basin had been constructed upon privately owned land adjoining the canal property. It was used "by persons navigating boats on the canal in lading, unlading, passing and turning." Occasionally boats of the board of public works used the basin for like purposes and from time to time engineers employed by the board caused the basin to be cleaned. The basin having ceased to be used for canal purposes, the state brought an action to recover the land from the then owner who claimed title from the original owner of the land occupied by the basin. In denying the state's claim the court used the following significant language, at page 283:

> "It was not the purpose of the Act nor was it the policy of the state, to take land of the citizen for public use without affording the owner an opportunity to make application for an appraisal, and upon appraisal being made as prescribed by statute to pay damages if any are assessed. It is clear, also, that the act contemplates such assertion of exclusive control as would put the owner on notice that the property had been taken by the state for its own, and incorporated as part of its canal system. * * * There was no time when Dixon, or his successors in title, could have had the benefit of the provisions as to appraisal, for, as already found, neither had notice of the intention on the part of the state to acquire the property under the statute."

So also in the *Middletown* case the court said:

> "We think it may be conceded, notwithstanding the reservation from the grant, that, if the occupancy of the state of this particular feeder and the land upon which it is located had been exclusive and in denial of the claimed rights of Abner Enoch, the occupancy by the state of this feeder would have amounted to an appropriation of Abner Enoch's lands and water rights and relegated

him, as to remedy, to a recovery of the value of his property and water rights, but the State of Ohio, during all this period, not only abstained from such occupancy as would appropriate the lands and water rights of Abner Enoch, but by its departmental construction affirmatively recognized his joint occupancy, so that the time, to this day, has not come when Abner Enoch, or his successors, could have the value of these property rights ascertained and compensation therefor awarded." (P. 450.)

We recognize that in *Elevator Co. vs. Cincinnati*, 30 O. S., 629; *Fox vs. Cincinnati*, 104 U. S. 783; *Hubbard vs. Toledo*, 21 O. S. 379, the right of the state to retain the canals for hydraulic purposes after their abandonment for navigation was doubted and that, in that connection this court in *Kaukauna Water Power Co. vs. Green Bay*, 142 U. S. 254, said:

> "In *Little Miami Elevator Co. vs. Cincinnati*, 30 O. S. 629, the right to lease surplus water for private use was recognized as an incident to the public use of a canal for the purpose of navigation; but it was held that such use was a subordinate one, and that the right to the same might be terminated whenever the state, in the exercise of its discretion, abandoned or relinquished the public use. It was doubted whether the state could, after abandoning the canal, as a public improvement, still reserve to itself the right to keep up a water power solely for private use and as a source of revenue. 'By so doing,' said the court, 'the water power would cease to be an incident to the public use, and the state would be engaged in the private enterprise of keeping up and renting water power after it ceased to act as a government in keeping up the public use.' The same ruling was made by this court in *Fox vs. Cincinnati*, 104 U. S. 783; (26:928) see also *Hubbard vs. Toledo*, 21 O. S. 379."

The state, however, actually has done that thing, *i. e.*, it has retained the canals for hydraulic purposes long after their use for navigation purposes has ceased. Having done so, the status of the state in respect of the canals can be nothing else than that of a proprietor, nor, in the face of the Act of April 9, 1902, 95 Ohio Laws 118, can it be said that the state has been acting *ultra vires* in retaining the canals as a proprietor for hydraulic purposes. By the terms of that Act the board of commissioners were expressly ordered to investigate all water contracts on the Miami and Erie Canal and to "revise and readust them upon a fair and equitable basis as to the rents to be paid in the future." (Brief on behalf of appellee, pp. 107-108.) This was done in the face of knowledge on the part of the legislature that navigation on the canal had already ceased. It was susceptible of but one interprettion, *viz.*: navigation being no longer the paramount purpose or even any purpose of the canal, and the generation of hydraulic power having become the paramount purpose, the legislature intended to recognize that fact by ordering the commissioners to revise the state's water contracts and make the most of them; in fact, the paragraph following the one above quoted requires that a special report be made to the next general assembly "as to what extent the rates for water rent may be increased." If such action of the general assembly did not give and was not intended to give legislative sanction to the changed conditions under which the state found itself to be the proprietor of a water power rather than the operator of a canal, we altogether misunderstand the meaning and effect of some fairly elementary language.

B. Contractual Versus Sovereign Rights:

If, as is consistently contended in the memorandum on behalf of appellants submitted since the oral argument, the alleged right of the state to discontinue the Minor water power rests in contract rather than in the sovereign power of the state, the complete answer is found in the admitted fact that the Minor grant contains *no right in the state to resume the water either for navigation purposes or otherwise.* True, the water is to be "applied at all seasons of the year except when otherwise necessary for navigation of the canal or when breaches occur, repairs become necessary and other unavoidable causes prevent." (R. 37.) But that is not the equivalent of a reservation in the state of the right to resume the water for navigation to the destruction of its use for hydraulic purposes. Rather, it is consistent with the idea that the water was to *remain* where it is, but that the volume necessary to turn Minor's millstones should not be used for that purpose if required for the purpose of navigation. So also the following provision of the Minor grant is equally consistent with appellee's contention that the state considered itself definitely obligated to furnish the water subject only to the limitation that it should not be done to the prejudice of navigation or the damage and injury of other adjacent mill owners and proprietors of water power:

> "Provided that nothing herein contained shall hold the State of Ohio *responsible* to furnish the above amount of water or any part thereof to the said party of the second part, to the damage and injury of mill owners and proprietors of water power on the Maumee River at, opposite and below the towns Providence and Gilead." (R. p. 37.)

Apart from that proviso, however, and subject to the necessities of navigation, the responsibility to furnish the water is plainly recognized.

As further reflecting upon the intention of the parties as expressed in their *contract* (the Minor grant, R. 38), the state agreed to erect and complete the regulating gate and weir via which the Minor water was to be taken from the canal. They were to be constructed of "stone walls of solid masonry and suitable timber and iron with the necessary embankments," all indicating that the state was contracting to insure *permanently* to Minor, his heirs and assigns, the equivalent of his previously-owned water power; all of it consistent with the idea of a *joint* ownership and use of the water; none of it consistent with appellants' theory that the state, by abandoning the canal, might wipe out the water power at will, notwithstanding the fact, plainly appearing from Stipulation Exhibits 1 and 2 (R. 37, 43), that neither Minor nor his successors in title have ever been paid for his original water rights except to the extent and in the manner shown by those exhibits. If the Act attacked in this case shall be enforced then those original rights will never be paid for.

CONCLUSION

In conclusion the following is submitted on behalf of appellee in the Providence Mill Company case (No. 675):

(1) Originally, Minor owned the water power in fee simple.

(2) Obviously, the only reason Minor failed to reserve the water power in the first instance (as was

done in the *Middletown* case) was because the state, by taking possession of the water without his consent, rendered such a reservation impossible.

(3) However, the state's taking of the water coupled with the concurrent *restoration* of a part of it to Minor in fee was the equivalent of the *reservation* of water power sustained in the *Middletown* case.

(4) The entire transaction shows that the parties (the state and Minor) intended the ownership of the water to be *joint*, as it was held to be in the *Middletown* case; it negatives the intention that the state's taking of the water was to be *exclusive*, as against Minor and in favor of the state, *i. e.*, that it was to be wholly owned by the state, in fee simple.

(5) The *Middletown* case definitely recognizes the right of the canal commissioners to acquire and hold a water power *jointly* with the original owner, *i. e.*, less than a fee simple exclusively in the state.

(6) The claim that Minor surrendered the water power (owned by him in fee simple) in return for a *temporary* water *lease* which the state might abrogate at will, is wholly untenable and inconsistent with the obvious intention of the parties.

(7) The grant to Minor was in no sense a *lease* notwithstanding the use of the words "lease" and "agreement" in two or three places; it was a definite grant of water in consideration of Minor's grant to the state; it employs the words "lease and convey" in the granting clause; at other points the words "leased," "leased and conveyed," "granted," etc. No rental is reserved to the state, and the instrument simply is not a lease at all, being an out-and-out grant, with words of perpetuity.

(8) To permit the state to destroy the water power and at the same time retain Minor's mill race and land, granted by him to the state in consideration of the water power, would be unconscionable. The state, as a grantee of property, has no right to destroy the consideration upon which the grant was made. *Cleveland Terminal, etc., Co. vs. State*, 85 O. S. 251.

Respectfully submitted,

U. G. Denman,
Karl E. Burr,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 675.—October Term, 1928.

Harry J. Kirk, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, etc., et al., Appellants, *vs.* The Providence Mill Company.	Appeal from the District Court of the United States for the Southern District of Ohio.

[June 3, 1929.]

Mr. Justice Stone delivered the opinion of the Court.

This is a direct appeal, under § 266 of the Judicial Code, from a final decree, following an interlocutory decree, of a district court of three judges for southern Ohio, enjoining appellants, the state director of highways, the superintendent of public works of Ohio, and county commissioners, from draining or otherwise interfering with the flow of water in a section of the Miami & Erie Canal, in such manner as to interfere with the rights of appellee to take surplus water under a grant from the state to appellee's predecessor in interest. — F. (2d) —. The questions presented are the same as those in No. 674, *Kirk* v. *Maumee Valley Electric Company*, *ante*, p. —, decided this day, the only difference being in the nature of the grant under which appellee derives its rights to the water.

The grant here involved is embraced in an indenture of September 1, 1842, between the commissioner of the Board of Public Works and one Minor, as readjusted on February 23, 1846. By it Minor, a riparian owner, released and quit claimed to the state all claims against it arising out of the use and occupation by the state of water from the Maumee River and of lands used in the construction and operation of the Wabash & Erie canal, now the Miami & Erie. This release was made in consideration of a perpetual

grant by the state, made after the passage of the Act of March 23, 1840, 38 O. L. 87, discussed at length in our opinion in No. 674, *Kirk* v. *Maumee Valley Electric Company, supra*. By the grant the state sold and conveyed a specified quantity of water "except when otherwise necessary for the navigation of the canal" and the contract as readjusted was similarly restricted. The grant was subject to the limitations of the Statute of 1840, and the rights conferred under it did not, for present purposes, differ from those considered in No. 674. They were likewise subject to the reserved power of the state to abandon the canal and devote it to other purposes, which was exercised by the Act of the Ohio Legislature of May 11, 1927, 112 Ohio Laws 350. For the reasons discussed at length in No. 674, and equally applicable here, the judgment below is

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.